ORIGINAL

No. 82-6979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ANTHONY J. LARETTE, JR.

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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TABLE OF AUTHORITIES

Constitutional Provisions and Statutes Cited

OPINION BELOW

The opinion of the Supreme Court of Missouri affirming petitioner's conviction of capital murder and sentence of death is reported as State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983).

STATEMENT OF THE CASE

Petitioner Anthony J. LaRette, Jr., was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the murder of Mary Fleming. The facts of this crime are extensively set out in State v. LaRette, 648 S.W.2d 96, 98-101 (Mo. banc 1983), and will not be restated here. Respondent would note that the facts as stated in petitioner's petition are self-serving and argumentative in that he omits numerous references to the evidence establishing his guilt and advances factual issues which were rejected by the verdict of the jury.

Of the three claims presented by petitioner in his present petition, the first (relating to the Missouri Supreme Court's procedure of proportionality review) was only arguably raised for the first time in petitioner's Motion for Rehearing following the issuance by the Supreme Court of its opinion affirming his conviction and sentence. Under Missouri law, motions for rehearing may not be used to present new issues to the court (see respondent's Argument, infra). Petitioner's second contention, that the aggravating circumstances found in his case were made into two aggravating circumstances by the Missouri Supreme Court and thus unconstitutionally construed Missouri's death penalty statutes, has never been advanced to any state trial or appellate court. Likewise, petitioner's third contention, that the opinion of the Missouri Supreme Court affirming petitioner's conviction contravened Zant v. Stephens, ____ U.S. ____ 51 U.S.L.W. 4891 (1983) has never been advanced to any state trial or appellate court.

ARGUMENT

1. Proportionality Review of Death Sentences

The first of three theories advanced by petitioner is that the Missouri Supreme Court failed to conduct a proper review on the issue of whether his death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," § 565.014.3(3), RSMo 1978, which review petitioner claims was required. Petitioner claims that the court's failure to properly conduct the proportionality review denied petitioner effective assistance of counsel. Petitioner's attempt is to bring his case within the scope of the issue currently before this Court in Pulley v. Harris, No. 82-1095 (cert. granted March 22, 1983).

A major initial difficulty with this contention, wholly unaddressed by petitioner in his petition, is that the present claim has not as yet been presented in any reviewable fashion to the Missouri courts. Petitioner's first attempt to challenge the Missouri Supreme Court's process of proportionality review came after the appellate affirmance of his conviction and sentence, petitioner only arguably presenting the contention in his Motion for Rehearing before the Supreme Court. Under long-established Missouri law, legal claims and theories are not properly reviewable when raised for the first time in motions for rehearing after the issuance of the opinion by the appellate court. State v. Bolder, 635 S.W.2d 673, 693 (Mo. banc 1982), cert. denied, ___ U.S. ____, 103 S.Ct. 770 (1983); State v. Oliver, 520 S.W.2d 99, 101-102 (Mo.App.,Spr.D. 1975). Missouri Supreme Court Rule 84.17 states that "[t]he sole purpose of a motion for rehearing is to call attention to material matters of law or facts overlooked or misinterpreted by the court, as shown by its opinion." In light of these authorities, the present contention is not properly reviewable in the present petition. As this Court has noted,

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 422 U.S. 510, 527 (1979). Since there is not the slightest indication from the Missouri Supreme Court's opinion that it reviewed petitioner's improperly-raised claim, cf. State v. Bolder, supra, at 693, it cannot be said that they were "adequately presented in the state system." Street v. New York, 394 U.S. 576, 582 (1969). Unless and until petitioner makes some attempt to properly present this issue in a state court, review in the federal system is inappropriate. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Even ignoring petitioner's failure to obtain a state court adjudication of the issue he currently presents, the absence of a legitimate ground for the granting of a writ of certiorari is apparent from the record. To begin with, it is absurd for petitioner to equate the situation in the case at bar with that in Pulley v. Harris, supra. In Harris, the California Supreme Court made no mention of the proportionality issue in its opinion affirming the defendant's conviction and sentence, People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240 (1981), and the Ninth Circuit concluded therefrom that the state court "gave no indication that any type of proportionality review...was undertaken." Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 1144 (March 22, 1983). In the present case, by contrast, the Missouri Supreme Court explicitly reviewed and discussed this issue in its opinion:

We turn now to defendant's contention that the sentence of death in this case is excessive and disproportionate.

The General Assembly has mandated that this Court shall consider the matter of the death sentence being imposed and requires us to determine (§ 565.014.3, RSMo 1978):

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We find nothing in the record to suggest the sentence resulted from the influence of passion, prejudice, or any other arbitrary factor. There was substantial evidence to support the jury's finding of statutory aggravating circumstances. We conclude that considering the instant crime and the defendant in this case that the penalty imposed is not excessive nor disproportionate to the penalty imposed in similar cases. State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982). State v. LaRette, 648 S.W.2d 98, 105 (Mo. banc 1983).

In the face of this language, it cannot legitimately be asserted by petitioner that certiorari should be granted in this case under the aegis of Pulley v. Harris, supra.

To the extent that it does not consist of a series of cited platitudes (Petition at 6-8), petitioner's argument seems to be that, because the Missouri Supreme Court did not extensively cite, compare and discuss in its opinion the other cases before it in which the sentences of death and life imprisonment were submitted to the jury the court failed to conclude a proper review on the issue of proportionality (Petition at 8). Petitioner elaborates upon this allegation by imputing improper motives to the Supreme Court, describing its proportionality review as a "cursory, dilatory fashion" running "roughshod over those protections preserved by the statute and relied on in this Court's opinions" (Petition at 8). The difficulty with these assertions is that, whatever petitioner might wish to conclude, this is an issue of fact and the record if devoid of the slightest evidence which would support his allegations. In its opinion affirming his conviction and sentence, the Supreme Court stated that it had reviewed the facts of the present case and, in comparing this case with other cases previously before it, concluded that petitioner's sentence was not excessive or disproportionate. State v. LaRette, supra, at 105. Petitioner now asks this Court to conclude, on the basis of a completely silent record, that the Missouri Supreme Court was perpetrating a fraud when it stated that it properly considered the other cases in rendering its decision. Such an attempt by petitioner is insupportable. It cannot reasonably be argued, and petitioner does not even attempt to contend, that it is a matter of constitutional import whether all aspects of the state court's proportionality review appear on the face of the appellate opinion, or whether the details of this review are ascertained by other evidence.

Petitioner further argues that the Missouri Supreme Court's "method of 'no-review'" denies petitioner effective assistance of counsel in that counsel was unable to present the argument that petitioner's sentence was disproportionate not knowing "the criteria or pool of similar cases by which proportionality review is to be conducted." (Petition at 9). The Missouri Supreme Court has repeatedly held the cases properly subject to comparison with a case where the death penalty is rendered are those "in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal." State v. Mercer, 618 S.W.2d 1, 11 (Mo. banc 1981), cert. denied 102 S.Ct. 432 (1982).[1] Petitioner's counsel on appeal cited and discussed fourteen cases by which to compare petitioner's sentence. Thus, petitioner had ample opportunity to present his proportionality argument to the Missouri Supreme Court.

Finally, petitioner argues that the Missouri Supreme Court violated petitioner's substantive due process right, by failing to conduct a proportionality review created by state statute. The Missouri Supreme Court stated that it had reviewed the facts of the present case and comparison with other cases allowed the conclusion that petitioner's sentence was not excessive or disproportionate. Petitioner's assertains to the contrary are unsupportable. That being the case, petitioner's first claim presents no colorable issue which is reviewable by this Court on the present record.

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[1] A reading of the Supreme Court summaries of capital murder cases prepared pursuant to § 565.014.6, show that only 11 involved a sentence of death and 14 imposed the alternative sentence for capital murder, life imprisonment with no possiblity of parole for fifty years. If requested, respondent will supply certified copies of these summaries, which are contained in the Missouri Supreme Court's file on petitioner's appeal.

2. Aggravating Circumstance

Petitioner's second claim is that the Missouri Supreme Court in its review of petitioner's death sentence, under § 565.014.3(2) RSMo 1978 concluded that the jury found two aggravating circumstances when it found that:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or deprivity of mind."

§ 565.012.2(7) RSMo 1978 and thus the court violated the Missouri Statutes "the constitutionality of which depends on its meaningful review of death sentences." (Petition at 12). The inital point to be noted is that this theory was never advanced in any form before any state trial or appellate court. Accordingly, the present claim should not be heard for the first time here. Webb v. Webb, supra at 496-497.

In any event, the argument by petitioner is unsupported by any cited opinion of this Court. Clearly, and petitioner admits in his petition (petition at 12), that the only aggravating circumstance submitted to the jury was, as previously cited:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

§ 565.012.2(7) and it constitutes one aggravating circumstance which the jury so found. The Missouri Supreme Court, in its analysis and consideration did not alter the instruction given to the jury nor did it alter the jury's verdict. In Gregg v. Georgia, 428 U.S. 153 (1976), the holding of this Court was that the present aggravating circumstance was constitutionally valid so long as it was not overbroadly applied in the individual cases. Gregg v. Georgia, supra, at 201. Petitioner does not complain that the aggravating circumstance was applied overbroadly only that the Missouri Supreme Court interpreted it as two aggravating circumstances, thus not asserting a violation of Godfrey v. Georgia, 446 U.S. 420 (1980). Simply put, the

submitted aggravating circumstance, however petitioner cares to interpret the Missouri Supreme Court's choice of language, is a simple aggravating circumstnace and is not in the proper posture to take up the question left reserved in Zant v. Stephens, ___U.S.____, 51 U.S.L.W. 4891, 4898 (1983): i.e. "the possible significance of a holding that a particular aggravating circumstance is 'invalid'" might be inasmuch as the aggravating circumstance found by the jury in the instant case is a valid one. Nothing in the facts of this case warrants a review by certiorari of petitioner's conviction and sentence.

3. Violation of Zant v. Stephens

Finally, petitioner asserts that the Missouri Supreme Court violated the holding of this Court in Zant v. Stephens, supra. As with petitioner's previous contentions this claim was never advanced in any form before any state trial or appellate court. Accordingly, under Webb v. Webb, supra at 496-497, this claim should not be heard for the first time here. In any event, the instant case, despite petitioner's arguments to the contrary, is not in the proper posture to address the question reserved in Zant v. Stephens, supra. The jury returned only the statutory aggravating circumstance discussed in point II supra, and petitioner does not claim it is violative of Godfrey v. Georgia, supra. Thus, the jury did not find an aggravating determined to be invalid. Nothing in the facts of this case warrants a review by this Court on certiorari.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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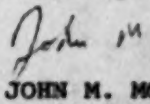

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